87-1397

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

LLOYD BOERSMA and PHYLLIS BOERSMA,
For Themselves and All Persons Similarly Situated,

Plaintiffs-Appellants,

vs.

DONNA KARNES, Nebraska State Tax Commissioner;
and NEBRASKA DEPARTMENT OF REVENUE,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the Court below improperly held that neither the provisions of 42 U.S.C.S. § 407 nor those of 26 U.S.C.S. § 86 preclude the State of Nebraska from taxing Social Security benefits under NEB. REV. STAT. § 77-2715 (1983 Supp.).

Whether the Court below improperly held that a tax on Social Security benefits under NEB. REV. STAT. § 77-2715 (1983 Supp.) is not an unconstitutional burden on the power of Congress to provide for the general welfare in violation of the Supremacy Clause contained at Art. VI., cl. 2 of the United States Constitution.

LIST OF PARTIES

All Appellants are listed in the caption of the Notice of Appeal contained at Appendix C (App. 19). Lloyd Boersma died on June 26, 1986. On October 1, 1986, the Supreme Court of the State of Nebraska entered an Order of Revivor allowing Kathrine A. Boersma, Personal Representative of the Estate of Lloyd Boersma, to proceed with the appeal on behalf of Lloyd Boersma. All Appellees are listed in the caption of the Notice of Appeal contained at Appendix C (App. 19). Appellants do not believe that the provisions of 28 U.S.C.S. § 2403(b) are applicable because the State of Nebraska is a party to this proceeding and has been represented at all stages of this proceeding by the Attorney General of the State of Nebraska.

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Pursuant to Rules 12.3 and 15 of the Rules of the Supreme Court of the United States, Lloyd Boersma and Phyllis Boersma, Appellants, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska, in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska appears in *Boersma v. Karnes*, 227 Neb. 329, ___ N.W.2d ___ (1988) and is included herein as Appendix A (App. 1). The judgment of the District Court of Nuckolls County, Nebraska is included as Appendix B (App. 18).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to recover a refund of state income taxes paid on Social Security benefits received by the Appellants. The judgment of the Supreme Court of the State of Nebraska affirming the decision of the District Court of Nuckolls County, Nebraska, was entered January 8, 1988. A timely notice of appeal was filed on January 28, 1988, in the Supreme Court of the State of Nebraska. A copy of the Notice of Appeal was timely filed with the District

Court of Nuckolls County, Nebraska, on January 28, 1988. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, subparagraph (2). Cases that sustain the jurisdiction of this Court include: *R. J. Reynolds Tobacco Co. v. Durham County, North Carolina, et al.*, (1986, U.S.), 107 S. Ct. 499, 93 L.Ed.2d 449 (1986); *Xerox Corp. v. County of Harris Texas, et al.*, 459 U.S. 145, 103 S. Ct. 523, 74 L.Ed.2d 323 (1982). This case involves a statute of the State of Nebraska which is claimed to be repugnant to the Constitution and laws of the United States. The decision of the Supreme Court of the State of Nebraska was in favor of the validity of the statute of the State of Nebraska. Appellants request that this appeal be regarded and acted on as a petition for writ of certiorari if this appeal is improvidently taken or if the proper mode of review is by petition for certiorari as provided in 28 U.S.C.S. § 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of NEB. REV. STAT. § 77-2715 (1983 Supp.), which subjects Social Security benefits to state income taxation, is set out verbatim in Appendix D (App. 25). NEB. REV. STAT. § 77-2715 (1983 Supp.) is claimed to be repugnant to 42 U.S.C.S. § 407. The text of 42 U.S.C.S. § 407 is set out verbatim in Appendix D (App. 25). NEB. REV. STAT. § 77-2715 (1983 Supp.) is claimed to be

repugnant to the Supremacy Clause contained in Art. VI., cl. 2 of the Constitution of the United States. The text of Art. VI., cl. 2 is set out verbatim in Appendix D (App. 26).

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follow: Appellants filed a U.S. Individual Income Tax Return for 1984 on Form 1040 and included one-half (1/2) of total Social Security benefits of Twenty Thousand Seven Hundred Ninety-Eight and No/100 Dollars ($20,798.00) received by Appellants in total income for federal tax purposes. Appellants also filed a Nebraska Individual Income Tax Return for 1984 on Form 1040N. The Nebraska income tax liability was computed by applying a percentage to the federal tax liability under NEB. REV. STAT. § 77-2715 (1983 Supp.). The computation under NEB. REV. STAT. § 77-2715 (1983 Supp.) resulted in a state tax liability to Appellants of Three Thousand One Hundred Fourteen and No/100 Dollars ($3,114.00). This amount included Seven Hundred Sixty-Six and No/100 Dollars ($766.00) which was attributable to a state tax on Social Security benefits received by Appellants. Appellants filed a claim for refund consistent with applicable law claiming that Social Security benefits were not subject to state income taxation. The claim was denied by Appellees, and Appellants filed an action in the District Court of Nuckolls County, Nebraska, consistent with applicable law to obtain a refund of state income taxes. Appellants raised the federal questions at the initial stages of the

proceedings in pleadings filed with the District Court of Nuckolls County, Nebraska. The District Court of Nuckolls County, Nebraska, rejected the arguments of Appellants in regard to the federal questions, denied Appellants' Motion for Summary Judgment and allowed Appellees' Motion for Summary Judgment holding, as a matter of law, that the State of Nebraska was allowed to impose a state income tax on Social Security benefits. Appellants timely appealed to the Supreme Court of the State of Nebraska. The federal questions were raised upon appeal at the initial stages of the proceedings in the Assignment of Errors contained in the Brief of Appellants. The Supreme Court of the State of Nebraska rejected the arguments of Appellants in regard to the federal questions and affirmed the decision of the District Court of Nuckolls County, Nebraska. The pertinent quotations from the opinion of the Supreme Court of the State of Nebraska contained at *Boersma v. Karnes*, 227 Neb. 329, ___ N.W.2d ___ (1988) of a nature to bring the case within the jurisdiction of the Supreme Court of the United States are as follows:

> (1) The Supreme Court of the State of Nebraska noted: "When this return was filed in 1985 for the 1984 tax year, the Nebraska income tax liability was computed by applying the appropriate state income tax rate to the federal tax liability. See NEB. REV. STAT. Section 77-2715(1) (Supp. 1983). This computation resulted in state tax liability for plaintiffs of $3,114. This figure included $766 which was attributable to state taxation of Social Security benefits." 227 Neb. at 331;
>
> (2) The Supreme Court of the State of Nebraska noted: "Plaintiffs first contend that the Nebraska tax on plaintiff's Social Security benefits results in

an unconstitutional burden of the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the 'supremacy clause.' " 227 Neb. at 332; and

(3) The Supreme Court of the State of Nebraska noted: "Plaintiffs then contend that 42 U.S.C. § 407 precludes Nebraska from taxing these benefits." 227 Neb. at 335.

Appellants have not requested the clerk of the court possessed of the record to certify it and provide for its transmission as provided in Rule 13 of the Rules of the Supreme Court of the United States. Appellants do not deem the record to be essential to a proper understanding of the case within the meaning of Rule 13 of the Rules of the Supreme Court of the United States.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that a state income tax on Social Security benefits is repugnant to the Constitution and laws of the United States. The grounds of this appeal are substantial because the State of Nebraska has imposed a tax on Social Security benefits in violation of the Constitution and laws of the United States. The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution because a large number of residents of the State of Nebraska have been subject to a tax on Social Security benefits since 1984 in violation of the Constitution and

the laws of the United States. The residents of the State of Nebraska that have been subject to a state income tax on Social Security benefits are all residents who are subject to a federal income tax on Social Security benefits and are either single taxpayers with gross income in excess of Twenty-Five Thousand and No/100 Dollars ($25,000.00) or married taxpayers who file joint returns with gross income in excess of Thirty-Two Thousand and No/100 Dollars ($32,000.00). *See* 26 U.S.C.S. § 86. A determination as to whether Social Security benefits are subject to state taxation would also affect the power of states other than Nebraska to impose a state tax on Social Security benefits. The nature of the case and of the court rulings are such as to bring the case within jurisdictional provisions because the Supreme Court of the State of Nebraska has upheld the validity of a state statute which is claimed to be repugnant to the Constitution and laws of the United States within the meaning of 28 U.S.C.S. § 1257(2).

NEB. REV. STAT. § 77-2715 (1983 Supp.) is claimed to be repugnant to the provisions of 42 U.S.C.S. § 407. According to 42 U.S.C.S. § 407:

> "§ 407. Assignment
>
> (a) The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after the date of the enactment of this section

> [enacted Aug. 14, 1935], may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."

In clear and unambiguous language, 42 U.S.C.S. § 407 provides that the right of any person to Social Security payments is not transferable or assignable. A state tax on Social Security benefits may be interpreted as a transfer or assignment. In addition, none of the moneys paid are subject to execution, levy, attachment, garnishment, or other legal process. A state tax on Social Security benefits may subject moneys paid to levy or other legal process. In the context of taxation, the term "levy" means the legislative function and declaration of the subject and rate or amount of taxation. *See State v. Brian*, 84 Neb. 30, 120 N.W. 916 (1909); *People v. Mahoney*, 13 Cal.2d 729, 91 P.2d 1029 (1939); *City of Richmond v. Eubank*, 179 Va. 70, 18 S.E.2d 397 (1942).

The term "levy" has been used by Congress in other instances to refer to a tax. *See* 4 U.S.C.S. § 107; 49 U.S.C.S. § 1513.

In several recent cases, the Supreme Court of the United States has used the words "levy" and "tax" interchangeably. In *United States v. New Mexico, et al.*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982), the Supreme Court of the United States noted:

> "Thus, immunity may not be conferred simply because the *tax* has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the *levy*." (Emphasis added). 455 U.S. at 734.

In *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 104 S. Ct. 291, 78 L.Ed.2d 10 (1983), the Supreme Court of the United States noted:

> ". . . The manner in which the state legislature has described and categorized § 239-6 cannot mask the fact that the purpose and effect of the provision are to impose a *levy* upon the gross receipts of airlines. . . . A state statute that imposes such a *tax* is therefore pre-empted." (Emphasis added). 464 U.S. at 13-14.

In *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L.Ed.2d 608 (1973), the Supreme Court of the United States considered the effect of 42 U.S.C.S. § 407 and concluded:

> ". . . The language is all inclusive: '[N]one of the moneys paid or payable . . .under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process. . . .' " 409 U.S. at 415.

The Supreme Court of the United States continued:

> "But § 407 does not refer to any 'claim of creditors'; it imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State." 409 U.S. at 416-417.

The prohibition against assignment of Social Security benefits under 42 U.S.C.S. § 407 is broad enough to bar a State from taxing Social Security benefits.

The conclusion that 42 U.S.C.S. § 407 prohibits a state tax on Social Security benefits is supported by an understanding of the relationship between 42 U.S.C.S. § 407 and 26 U.S.C.S. § 86.

The effect of 42 U.S.C.S. § 407 is to prohibit assignment of Social Security benefits. The effect of 26 U.S.C.S. § 86 is to subject Social Security benefits to federal income taxation.

According to 26 U.S.C.S. § 86:

"§ 86. Social security and tier 1 railroad retirement benefits.

(a) In general.

Gross income for the taxable year of any taxpayer described in subsection (b) includes (notwithstanding section 207 of the Social Security Act [42 USCS § 407]) social security benefits in an amount equal to the lesser of–

(1) one-half of the social security benefits received during the taxable year, or

(2) one-half of the excess described in subsection (b)(1)."

There is an express reference in 26 U.S.C.S. § 86 to 42 U.S.C.S. § 407. The reference is required since the prohibition against assignment of Social Security benefits in 42 U.S.C.S. § 407 may not be modified except by express reference.

On April 20, 1983, both 42 U.S.C.S. § 407 and 26 U.S.C.S. § 86 were amended by the same Act. According to Pub.L. 98-21. Title III, Part C, Section 335, 97 Stat. 130:

"NONASSIGNABILITY OF BENEFITS

Sec. 335. (a) Section 207 of the Social Security Act is amended–

(1) by inserting '(a)' before 'The right'; and

(2) by adding at the end thereof the following new subsection:

'(b) No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.'.

(b)(1) . . .

(2)(A) Section 86(a) of the Internal Revenue Code of 1954 (as added by section 121(a) of this Act) is amended by inserting '(notwithstanding section 207 of the Social Security Act)' before 'includes'.

. . .

(c) The amendments made by subsection (a) shall apply only with respect to benefits payable or rights existing under the Social Security Act on or after the date of the enactment of this Act."

Since 26 U.S.C.S. § 86 expressly refers to 42 U.S.C.S. § 407, it is clear that 26 U.S.C.S. § 86 modifies 42 U.S.C.S. § 407 as required by 42 U.S.C.S. § 407(b). If 26 U.S.C.S. § 86 modifies 42 U.S.C.S. § 407, then 42 U.S.C.S. § 407 must have prohibited what is sought to be accomplished by 26 U.S.C.S. § 86. Otherwise, there would be no need for 26 U.S.C.S. § 86 to expressly refer to 42 U.S.C.S. § 407 as required by 42 U.S.C.S. § 407(b). 26 U.S.C.S. § 86 subjects Social Security benefits to a federal income tax. As a result, 42 U.S.C.S. § 407 must be interpreted to prohibit a tax on Social Security benefits but for the express modification of 42 U.S.C.S. § 407 to allow a federal tax on Social Security benefits under 26 U.S.C.S. § 86. The amendment to 26 U.S.C.S. § 86 does not modify 42 U.S.C.S. § 407 to allow a state tax on Social Security benefits.

As a result, 42 U.S.C.S. § 407 must be interpreted as a prohibition against a tax on Social Security benefits because of the need for an express modification of 42 U.S.C.S. § 407 to allow a federal income tax on Social Security benefits. This conclusion is supported by a reference in a leading tax service. According to Research Institute of America Federal Tax Coordinator 2d, Section J-1430:

> "This inclusion rule applies notwithstanding section 207 of the Social Security Act (42 USC § 407; 42 USCS § 407) (which provides that no other provision of law may be construed to limit or modify the right of any person to social security payments, except to the extent it does so by express reference to sec. 207)."

The meaning of 42 U.S.C.S. § 407 may be determined by reference to other factors. In *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y., 1983), the United States District Court for the Southern District of New York considered the meaning of 42 U.S.C.S. § 407 and noted:

> "The meaning of a statute may be discerned by a review of its language, intent and legislative history." *Id.* at 598.

The United States District Court for the Southern District of New York noted:

> " 'The starting point in every case involving the construction of a statute is the language itself.' . . . The literal words used in § 207(a) are clear and unambiguous: '[t]he right of any person to any future payment [of OASDI] shall not be transferable or assignable [or] . . . subject to . . . other legal process.' Regarding this section, the Supreme Court has stated that 'section 407 . . . imposes a

broad bar against the use of any legal process to reach all social security benefits.' *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417, 93 S. Ct. 590, 592, 34 L.Ed.2d 608 (1973)." *Id.* at 598.

According to the United States District Court for the Southern District of New York:

"The second factor which must be considered in construing a statute is its intent. . . . OASDI was created to provide for the care and maintenance of the elderly, survivors, and the disabled. . . . Section 207(a) was promulgated to protect social security benefits from the reach of creditors. . . ." *Id.* at 598.

According to the United States District Court for the Southern District of New York:

"Legislative history provides the third source of interpretation of statutes. . . . The legislative history of the Social Security Act, enacted originally in 1935 and amended in 1939, fails to discuss section 207(a). However, section 207(b), enacted on April 20, 1983 in order to restrict modification of section 207(a), is briefly elaborated upon in legislative history which reveals that, after the passage of the Bankruptcy Reform Act of 1978, hundreds of cases considered social security and SSI benefits of debtors to be income for purposes of a Chapter XIII bankruptcy. Section 207(b) was passed to prohibit assignment of these benefits 'notwithstanding any other provisions of law.' H.Rep. No. 1900, Pub.L. 98-21, 98th Cong., 1st Sess. 82-83, reprinted in [1983] U.S. Code Cong. & Ad.News 143, 301-302." *Id.* at 599.

According H.Rep. No. 1900, Pub.L. 98-21, 98th Cong., 1st Sess. 82-83, reprinted in [1983] U.S. Code Cong. & Ad.News 143, 301-302:

"Section 336. Nonassignability of benefits

Since 1935 the Social Security Act has prohibited the transfer or assignment of any

> future social security or SSI benefits payable and further states that no money payable or rights existing under the Act shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> Based on the legislative history of the Bankruptcy Reform Act of 1978, some bankruptcy courts have considered social security and SSI benefits listed by the debtor to be income for purposes of a Chapter XIII bankruptcy and have ordered SSA in several hundred cases to send all or part of a debtor's benefit check to the trustee in the bankruptcy.
>
> *Your Committee's bill specifically provides that social security and SSI benefits may not be assigned notwithstanding any other provisions of law*, including P.L. 95-598, the 'Bankruptcy Reform Act of 1978'. This provision would be effective upon enactment." (Emphasis added).

The language of 42 U.S.C.S. § 407 has been interpreted to impose a broad bar against the use of any legal process to reach all Social Security benefits. The language of 42 U.S.C.S. § 407 is broad enough to bar a state from imposing an income tax on Social Security benefits. The intent of 42 U.S.C.S. § 407 was to protect Social Security benefits from the reach of creditors. An income tax imposed by a state on Social Security benefits would frustrate the intent of 42 U.S.C.S. § 407 to protect Social Security benefits against assignment. The legislative history regarding 42 U.S.C.S. § 407 indicates that Social Security benefits may not be assigned notwithstanding any other provisions of law. An income tax imposed by a state on Social Security benefits would deprive the benefit recipient of a portion of the Social Security benefits.

A review of the language, intent and legislative history of 42 U.S.C.S. § 407 results in the conclusion that a state may not impose an income tax on Social Security benefits.

The prohibition against assignment of Social Security benefits under 42 U.S.C.S. § 407 is similar to the prohibition against assignment of railroad retirement benefits under 45 U.S.C.S. § 231m as follows:

> "§ 231m. Assignability; exemption from levy (a) Except as provided in subsection (b) of this section and the Internal Revenue Code of 1954 [26 USCS §§ 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated."

The language of 45 U.S.C.S. § 231m includes "levy" in the caption and "tax" in the body. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979), the Supreme Court of the United States compared 45 U.S.C.S. § 231m to 42 U.S.C.S. § 407 and noted:

> "Like anti-attachment provisions generally, see *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973); *Wissner v. Wissner*, *supra*, it ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process '[notwithstanding] any other law . . . of any State.' " 439 U.S. at 584.

The Court continued:

> "We, however, cannot so lightly discard the settled view that anti-assignment statutes have substantive meaning. Section 231m goes far beyond garnishment. It states that the annuity shall not be subject to any 'legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.' " 439 U.S. at 586.

The dissenting opinion in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979) noted:

> "The Court also noted that the state-court judgment, insofar as it ordered the diversion of future payments as soon as they were paid to the beneficiary, was contrary to a provision in the Act protecting such payments from 'seizure . . . either before or after receipt by the beneficiary.' " 439 U.S. at 596.

See also Wissner v. Wissner, 338 U.S. 655, 70 S. Ct. 398, 94 L.Ed. 424 (1950).

In light of these decisions, the judgment of the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska could be viewed as a seizure contrary to 42 U.S.C.S. § 407.

The dissenting opinion in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979) also discussed the intent of 45 U.S.C.S. § 231m and noted:

> "The drafters of the original legislation expressly stated that one of the important features of any retirement plan was a guarantee to the worker of an 'absolute' right to receive the pension. *Id.* at 11." 439 U.S. at 602.

A similar "absolute" right to receive Social Security benefits applies to Social Security benefit recipients

under 42 U.S.C.S. § 407. This "absolute" right to receive Social Security benefits may not be affected by an income tax imposed by a state.

The Supreme Court of the State of Nebraska rejected Appellants' argument that a state tax violated 42 U.S.C.S. § 407 in the opinion contained at *Boersma v. Karnes*, 227 Neb. 329, ___ N.W.2d ___ (1988) as follows:

> "We hold that neither the provisions of 42 U.S.C. § 407 nor those of I.R.C. § 86 preclude the State of Nebraska from taxing the portion of plaintiffs' Social Security benefits reported as federal taxable income." 227 Neb. at 338.

A substantial and important federal question exists as to whether a state tax on Social Security benefits violates the provisions of 42 U.S.C.S. § 407 and 26 U.S.C.S. § 86. This question requires plenary consideration.

A substantial and important federal question also exists as to whether a state tax on Social Security benefits frustrates the Congressional objective of providing Social Security benefits to recipients.

In *Maryland, et al v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L.Ed 2d 576 (1981), the Supreme Court of the United States noted:

> "The Supremacy Clause provides that '[t]his Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or laws of any State to the Contrary notwithstanding. Art. VI., cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect." 451 U.S. at 746.

If state taxation of Social Security benefits impedes the congressional objectives in regard to the Social Security Act, the state tax violates the Supremacy Clause. *See R. J. Reynolds Tobacco Co. v. Durham County, North Carolina, et al.*, (1986, U.S.), 107 S. Ct. 499, 93 L.Ed.2d 449 (1986); *Xerox Corp. v. County of Harris Texas, et al.*, 459 U.S. 145, 103 S. Ct. 523, 74 L.Ed.2d 323 (1982); *McGoldrick, Comptroller of City of New York v. Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L.Ed.2d 840 (1940). *See also Rice, et al. v. Santa Fe Elevator Corp., et al.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947); *Mayo, et al. v. United States*, 319 U.S. 441, 63 S. Ct. 1137, 87 L.Ed. 1504 (1943).

The Supreme Court of the United States has held that a state tax violated the Supremacy Clause in a variety of situations. In *White Mountain Apache Tribe, et al. v. Bracker, et al.*, 448 U.S. 136, 100 S. Ct. 2578, 65 L.Ed.2d 665 (1980), the Supreme Court of the United States held that a state tax on contractors performing services on an Indian reservation undermined the federal policy of regulating tribal affairs under the Indian Commerce Clause, Art. I, Section 8, cl. 3. In *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 104 S. Ct. 291, 78 L.Ed.2d 10 (1983), the Supreme Court of the United States held that a state tax on the annual gross income of airlines violated a federal statute passed as a part of a federal policy to regulate the air transportation system. In *Maryland, et al. v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981), the Supreme Court of the United States held that a "first-use" tax imposed on pipeline companies interfered with the federal regulation of the transportation and sale of natural gas in interstate commerce. In

Xerox Corp. v. Harris Texas, et al., 459 U.S. 145, 103 S. Ct. 523, 74 L.Ed.2d 323 (1982), the Supreme Court of the United States held that a state tax violated a federal scheme to establish a customs system which included provisions for government supervised bonded warehouses. *See also McGoldrick, Comptroller of City of New York v. Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L.Ed.2d 840 (1940).

Congress enacted the Social Security Act to provide for the general welfare under Article I, Section 8 of the United States Constitution. The constitutional power of Congress to enact the Social Security Act was upheld by the United States Supreme Court in *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, 81 L.Ed. 1307 (1937). Congress has expressed the intent that only Congress may alter, amend or repeal the Social Security Act. According to 42 U.S.C.S. § 1304:

> "The right to alter, amend or repeal any provision of this Act is hereby reserved to the Congress."

In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979), the Supreme Court of the United States compared 45 U.S.C.S. § 231m to 42 U.S.C.S. § 407 and noted:

> "Congress has made a choice, and § 231m protects it. It is for Congress to decide how these finite funds are to be allocated. The statutory balance is delicate. Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire. Any automatic dimunition of that amount frustrates the congressional objective. . . . Section 231m shields the distribution of benefits from state decisions that would actually reverse the flow of incentives Congress originally intended." 429 U.S. at 585.

The Court continued:

"An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check." 439 U.S. at 588.

The Court continued:

"Any such anticipation threatens harm to the employee, and corresponding frustration to federal policy, over and above the mere loss of wealth caused by the offset." 439 U.S. at 589.

The Court continued:

"For the present, however, the community property interest that respondent seeks conflicts with § 231m, promises to diminish that portion of the benefit Congress has said should go to the retired worker alone, and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck." 439 U.S. 590.

The objectives of Congress in protecting benefits received under the Railroad Retirement Act have been compared to the objectives of Congress in protecting benefits received under the Social Security Act. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979). By enacting the Social Security Act, Congress intended to provide for the general welfare by shifting wealth through the payment of Social Security benefits. Congress intended that the recipient receive the Social Security benefits. A state tax on Social Security benefits frustrates the congressional objective of providing Social Security benefits to the recipient.

The Supreme Court of the State of Nebraska agreed with Appellants' argument as to the federal purpose of the Social Security Act in the opinion contained at 227 Neb. 329, ___ N.W.2d ___ (1988) as follows:

> "We agree with plaintiffs' depiction of Congress' rationale for passing the Social Security Act. Plaintiffs cite *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, 81 L.Ed. 1307 (1937), where the U.S. Supreme Court discussed the authority of Congress to enact the Social Security Act and the purpose of the act:
>
> > Congress may spend money in aid of the 'general welfare.' Constitution, Art, I, section 8. . . .
> >
> > . . . .
> >
> > . . . The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near. 301 U.S. at 640-641." 227 Neb. at 333.

However, the Supreme Court of the State of Nebraska rejected Appellants' argument that a state tax on Social Security benefits frustrated the congressional objectives as follows:

> "Plaintiffs assert that *any* state taxation of these benefits burdens the act's operation. We disagree." 227 Neb. at 333.

A substantial and important federal question exists as to whether a state tax on Social Security benefits frustrates the Congressional objective of providing Social Security benefits to recipients. This question requires plenary consideration.

CONCLUSION

For the reasons stated above, Appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

KATHRINE A. BOERSMA, Personal Representative of the Estate of LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs-Appellants

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APPENDIX A

Opinion of the Supreme Court
of the State of Nebraska

Nebraska Advance Sheets
BOERSMA v. KARNES
Cite as 227 Neb. 329

LLOYD BOERSMA AND PHYLLIS BOERSMA, APPELLANTS, V. DONNA KARNES, NEBRASKA TAX COMMISSIONER, AND NEBRASKA DEPARTMENT OF REVENUE, APPELLEES.
___ N.W.2d ___

Filed January 8, 1988. No. 86-196.

1. Actions: Taxation: Parties. An action cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed.

2. ___: ___: ___. Neb. Rev. Stat § 77-2793 (Reissue 1986), which provides a procedure by which a taxpayer may obtain a refund of overpayment of income taxes, is exclusive and does not provide for class actions.

3. Statutes: Taxation. As a general rule of statutory construction, exemptions from taxation are to be narrowly construed.

4. Taxation: Social Security. Neither the provisions of 42 U.S.C. § 407 (Supp. III 1985) nor those of I.R.C. § 86 (Supp. III 1985) preclude the State of Nebraska from taxing the portion of Social Security benefits reported as federal taxable income.

5. ___: ___. The provisions of 31 U.S.C. § 3124 (1982) do not preclude the State of Nebraska from taxing the portion of Social Security benefits reported as federal taxable income.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Michael L. Johnson of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., AND COLWELL, D.J., Retired.

GRANT, J.

Plaintiffs-appellants, Lloyd and Phyllis Boersma, filed a U.S. income tax return for 1984 on form 1040 and included one-half of their total Social Security benefits as income for federal tax purposes. Plaintiffs also filed a Nebraska individual income tax return for 1984 on form 1040N. Pursuant to Nev. Rev. Stat. § 77-2795 (Reissue 1986), plaintiffs filed a claim for refund with defendant-appellee Donna Karnes, Nebraska Tax Commissioner. Plaintiffs contended that since one-half of their Social Security benefits had been indirectly taxed by the State of Nebraska, they were entitled to a refund in the amount of $766. In addition, plaintiffs claimed a refund on behalf of all other taxpayers similarly situated.

The claim was denied by the Tax Commissioner on August 13, 1985. Pursuant to Nev. Rev. Stat. § 77-2798 (Reissue 1986), plaintiffs then filed a petition in district court, for themselves and all taxpayers similarly situated, seeking review of defendant Tax Commissioner's denial of the refund claim. Defendants answered and then moved for summary judgment. The district court granted defendants' motion, holding that there were no issues of material fact and that, as a

matter of law, the State of Nebraska was allowed to base the income tax due Nebraska on a portion of Social Security benefits reported on plaintiffs' federal income tax return and that defendant Tax Commissioner was correct in denying plaintiffs' refund claim. The district court did not decide the question of whether a class action was allowable in this type of action. Plaintiffs timely appealed.

The issue in this case arises as a result of certain changes made by Congress in the federal Internal Revenue Code. Until January 1, 1984, Social Security benefits and tier 1 railroad retirement benefits were not included in gross income and therefore were not subject to federal income tax. Before that time, the Internal Revenue Service held that insurance benefit payments to individuals under the provisions of the Social Security Act were not includable in the gross income of the recipients.

Congress modified this general exclusion effective on January 1, 1984, by a change in the law, which is codifed at I.R.C. § 86 (Supp. III 1985). This change results in a portion of Social Security benefits being includable in gross income. Generally, the new law results in including one-half of Social Security benefits in gross income if the taxpayer's gross income plus Social Security benefits is over $25,000 ($32,000 for married, jointly filing taxpayers). For example, in the instant case, plaintiffs' gross income (including Social Security benefits) was over $88,000. As a result, one-half of their total Social Security benefits of $20,798 was includable in their gross income. The applicable federal tax rate was applied to this gross income figure, which generated plaintiffs' federal tax liability.

When this return was filed in 1985 for the 1984 tax year, the Nebraska income tax liability was computed by applying the appropriate state income tax rate to the federal tax liability. See Neb. Rev. Stat. § 77-2715(1) (Supp. 1983). This computation resulted in a state tax liability for plaintiffs of $3,114. This figure included $766 which was attributable to state taxation of Social Security benefits.

In their appeal plaintiffs set out two assignments of error: (1) that the district court erred when it refused to allow plaintiffs to maintain a class action under Neb. Rev. Stat. § 25-319 (Reissue 1985) for a refund of state income taxes on behalf of all persons similarly situated, and (2) that the district court erred when it granted defendants' motion for summary judgment, holding, in effect, that as a matter of law a portion of plaintiffs' Social Security benefits is subject to state income tax. We affirm.

Plaintiffs allege that the seeking of refunds of state income taxes is a proper matter for a class action pursuant to § 25-319. Such an assertion is contrary to the established rule in this state that an action "cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf." *Hansen v. County of Lincoln*, 188 Neb. 461, 465, 197 N.W.2d 651, 655 (1972), *supp. op.* 188 Neb. 798, 197 N.W.2d 655; *State ex rel. Sampson v. Kenny*, 185 Neb. 230, 175 N.W.2d 5 (1970); *Willms v. Nebraska City Airport Authority*, 193 Neb. 567, 228 N.W.2d 276 (1975).

In *State ex rel. Sampson v. Kenny*, *supra* at 232-33, 175 N.W.2d at 7, we stated:

> It is clearly the policy of the Legislature in setting up a refund statute to require individual action. Taxes ordinarily paid under a mistake of law are not recoverable, and the refund statute gives special relief in this situation. The county treasurer's duty arises only on a taxpayer's individual application. The legislature is authorized and may properly, on considerations of public policy, require individual applications and it is not mere speculation to suggest that this requirement is related to the security of the public treasury.

Neb. Rev. Stat. § 77-2793 (Reissue 1986) provides a procedure by which a taxpayer may obtain a refund of an overpayment of income taxes. This statutory procedure is exclusive and does not provide for class actions. In the absence of specific statutory authority waiving governmental immunity to permit representative suits, class actions cannot be maintained to recover taxes paid. Neb. Rev. Stat. §§ 77-2793 through 77-27,101 (Reissue 1986), the sections which pertain to income tax refunds, refer to actions brought by the taxpayer, with no mention of class actions.

Although *Sampson*, *supra*, and *Hansen*, *supra*, both involved property tax assessments rather than income tax, this court finds these cases controlling. We are not persuaded by plaintiffs' attempt to distinguish class actions in property tax cases from those involving, as in the instant case, income taxes. This court has repeatedly recognized the rule requiring individual actions in obtaining tax refunds. Plaintiffs' action in this case should not be treated as a class action.

With regard to plaintiffs' other assignment of error, plaintiffs do not contend that there is any fact question presented, but that the court erred as a matter of law.

Plaintiffs first contend that the Nebraska tax on plaintiffs' Social Security benefits results in an unconstitutional burden on the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the "supremacy clause." Plaintiffs state that "[t]he determining question is whether the income tax imposed by the State of Nebraska on Social Security benefits operates to 'retard, impede, burden, or in any manner control' the constitutional power of Congress to provide for the general welfare under the Social Security Act." Brief for Appellants at 6. Plaintiffs then assert that "[i]f the State of Nebraska has the power to tax Social Security benefits, it has the power to destroy the purposes of the Social Security Act." *Id.* That assertion is not correct.

We recognize that should Congress forbid the various states to tax federal Social Security benefits, in whole or in part, even though the federal government itself chose to tax such benefits, the federal law would control. Indeed, that is what has happened in this case, and the State of Nebraska has recognized the supremacy of federal law. See the later discussion herein comparing the effect of 45 U.S.C. § 231m (Supp. III 1985) (concerning the nontaxability of tier 1 railroad retirement benefits) and 42 U.S.C. § 407 (Supp. III 1985) (concerning the taxability of Social Security benefits). Until 1984, the Congress did not permit any taxation of Social Security benefits, and no taxing authority, federal or state, taxed such benefits.

Congress, with the passage in 1983 of the law codified at I.R.C. § 86, granted the federal government the power to tax Social Security benefits to a defined, limited extent by, in effect, dividing Social Security benefits into two categories–benefits going to persons with a

gross income greater than $25,000 for single taxpayers (or $32,000 for married, jointly filing taxpayers) and benefits going to those receiving less than those amounts. Section 86 requires only those individuals who are higher income taxpayers (as distinguished from "lower-income individuals" mentioned in the legislative history below) to include a portion of their Social Security benefits in gross income. Other taxpayers do not include any portion of their Social Security benefits in gross income.

We agree with plaintiffs' depiction of Congress' rationale for passing the Social Security act. Plaintiffs cite *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, 81 L.Ed. 1307 (1937), where the U.S. Supreme Court discussed the authority of Congress to enact the Social Security Act and the purpose of the act:

> Congress may spend money in aid of the "general welfare." Constitution, Art. I, section 8. . . .
>
> . . . .
>
> . . . The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

301 U.S. at 640-41.

Plaintiffs assert that *any* state taxation of these benefits burdens the act's operation. We disagree. When Congress modified the act in 1983, it in no way departed from the above-stated purpose. The legislative history of this modification explains the congressional policies and purposes behind the extension of federal taxation to a portion of these benefits.

> Your committee believes that the present policy of excluding all social security benefits from a

> recipient's gross income is inappropriate. Your Committee believes that social security benefits are in the nature of benefits received under other retirement systems, which are subject to taxation to the extent they exceed a worker's after-tax contributions and that taxing a portion of social security [sic] benefits will improve tax equity by treating more nearly equally all forms of retirement and other income that are designed to replace lost wages (for example, unemployment compensation and sick pay). . . .
>
> . . . .
>
> By taxing only a portion of social security and railroad retirement benefits (that is, up to one-half of benefits in excess of a certain base amount). Your Committee's bill assures that lower-income individuals, many of whom rely upon their benefits to afford basic necessities, will not be taxed on their benefits. The maximum proportion of benefits taxed is one-half in recognition of the fact that social security benefits are partially financed by after-tax employee contributions. The bill's method for taxing benefits assures that only those taxpayers who have substantial taxable income from other sources will be taxed on a portion of the benefits they receive.

H.R. Rep. No. 25, 98th Cong., 1st Sess. 24, *reprinted in* 1983 U.S. Code Cong. & Admin. News 219, 242.

It is clear, in light of the above-enunciated rationale, that Congress determined that federal taxation of higher income taxpayer's benefits did not adversely affect the purposes of the Social Security Act. The Congress deliberately lifted a defined portion of Social Security benefits into a category subject to federal tax. A state's indirect recognition of this taxable category does not, in any degree, give the state "the power to destroy the purposes of the Social Security Act," as

alleged by plaintiffs. Taxation of these Social Security benefits by states is always subject to disallowance by federal act, but that disallowance has not yet been enacted.

> That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied.

M'Culloch v. State of Maryland, 17 U.S. 415, 432, 4 Wheat. 316, 4 L.Ed. 579 (1819). Plaintiffs seem to imply that only the federal goverment is concerned about the care of people in financial difficulty because of age or other reasons and that only the federal government is concerned about retirement benefits in general. The State of Nebraska is vitally, and more immediately, concerned in those same areas. See, e.g., Neb. Rev. Stat. §§ 43-501 to 43-515 (Reissue 1984), 43-601 to 43-680 (Reissue 1984), 68-104 to 68-1521 (Reissue 1986), 71-516 to 71-518 (Reissue 1986), and 71-1401 to 71-1554 (Reissue 1986).

Plaintiffs then contend that 42 U.S.C. § 407 precludes Nebraska from taxing these benefits. Section 407 states, in pertinent part:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Plaintiffs contend that the word "levy" as used in § 407 refers to a tax levy and, therefore, that § 407 prohibits Nebraska from taxing Social Security benefits. If the word "levy," as used within the context of § 407, does mean "tax," the statute would act to preclude state taxation of these benefits. The thrust of plaintiffs' argument on this point rests on plaintiffs' contention as to the meaning of "levy" in § 407.

"Levy" is a term which is susceptible to divergent meanings, depending on how the word is used. When "levy" is used as a noun, Black's Law Dictionary provides two conceptually different definitions. "Levy" is initially defined in Black's as follows: "A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of money for which an execution has been issued." Black's Law Dictionary 816 (5th ed. 1979). Black's further defines "levy" as:

> In reference to taxation, the word may mean the legislative function and declaration of the subject and rate or amount of taxation. . . . "Levy," when used in connection with authority to tax, denotes exercise of legislative function, whether state or local, determining that a tax shall be imposed and fixing amount, purpose and subject of the exaction.

Id.

In order to ascertain which of these two definitions should be adopted for purposes of construing § 407, it is appropriate to examine the word "levy" within the context of the statutory language which surrounds it.

The word must be read in context with the remainder of the statute. Section 407 states that Social Security benefits shall not be "subject to execution, levy,

attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." The words surrounding "levy" in this statute operate to protect the Social Security benefits, which may be paid to persons such as plaintiffs, from judicial proceedings against persons such as plaintiffs. Judgment creditors in legal proceedings may not use the proceeds of the Social Security system to satisfy private obligations. Viewing the provision of § 407 in its entirety, we hold that plaintiffs' argument that the word "levy" is the equivalent of "tax" is without merit. In context with the remainder of the statute, the word "levy" refers to the enforcement of a judgment or other legal process involving the collection of debts through execution, attachment, garnishment, or levy.

Other courts have reached the same general conclusion. See *Matter of Neavear*, 674 F.2d 1201, 1205 (7th Cir. 1982), where the court stated:

> By its terms section 207 [42 U.S.C. § 407] is concerned with the protection of social security benefits from the reach of creditors. . . .
>
> . . . Section 207 speaks throughout in terms of the rights of social security *recipients* . . . and the protection of their *benefits* from the reach of creditors (through "execution, levy, attachment, garnishment, or other legal process").

(Emphasis in original.) Without more, § 407 clearly does not exclude state taxation of Social Security benefits.

Plaintiffs then argue that I.R.C. § 86 provides an additional indication of congressional intent with regard to the taxation of these benefits. This statute,

which results in a portion of Social Security benefits becoming subject to federal taxation, states in relevant part: "(a) In general. Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407]) includes social security benefits in an amount equal to the lesser of. . . ."

Plaintiffs point to the parenthetical clause in subsection (a) "(notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407])," and argue that if § 407 is not interpreted as prohibiting a tax on Social Security benefits, Congress would not have bothered to modify § 407 in I.R.C. § 86. The relevant portion of § 407 is set out above. Plaintiffs contend that the inclusion of this parenthetical statement is a clear indication that Congress interprets § 407 as a prohibition against a tax on these benefits. We do not agree, and hold that § 407 is not a specific indication of congressional intent to prohibit state taxation of Social Security benefits. As stated above, § 407 is concerned only with the protection of Social Security benefits from legal proceeding by creditors.

As a general rule of statutory construction, exemptions from taxation are to be narrowly construed. *Bingler v. Johnson*, 394 U.S. 741, 89 S. Ct. 1439, 22 L.Ed.2d 695 (1969). A section from the Railroad Retirement Act, 45 U.S.C. § 231m, provides us with an example of expressed congressional intent to exclude benefits from state taxation. Tier 1 benefits are those portions or railroad retirement benefits which are analogous to the Social Security benefits in this case. Tier 1 benefits were specifically excluded from state taxation in § 231m, which states in part:

> (a) Except as provided in . . . the Internal Revenue Code of 1954 [26 U.S.C. § 1 et seq.], notwithstanding any other law of the United States, *or of any State*, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process. . . .

(Emphasis supplied.)

Use of the word "tax" in § 231m indicates that Congress clearly recognizes the distinction between the words "tax" and "levy" in the context of exclusionary statutes, and clearly sets out how to exclude federal benefits from state taxation. We hold that neither the provisions of 42 U.S.C. § 407 nor those of I.R.C. § 86 preclude the State of Nebraska from taxing the portion of plaintiffs' Social Security benefits reported as federal taxable income.

Nebraska's recognition of the federal supremacy rights is further shown in the terms of Nebraska income tax form 1040N. That form, on line 25 of schedule II, specifically authorizes "adjustments decreasing federal taxable income, such as interest or dividend income from U.S. government bonds, other U.S. obligations, or Tier I or II benefits paid by Railroad Retirement Board." As set out above, § 231m expressly forbids state taxation of railroad retirement benefits. Nebraska does not tax those benefits. Also, as set out above, there is no such comparable federal statute prohibiting a state tax on Social Security benefits. Nebraska, therefore, taxes such benefits. The actions of the state have recognized the "supremacy clause."

We note that plaintiffs pled in paragraph 18 of their petition in the district court that the

> reduction for Tier I or II benefits paid by the Railroad Retirement Board with no reduction for Social Security benefits is discriminatory and constitutes unequal treatment of persons similarly situated, without a rational basis for distinction, thereby violating the equal protection clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 25 of the Nebraska Constitution.

Plaintiffs have not mentioned or discussed this issue in their brief. It is not properly before this court. We do not, therefore, discuss this issue.

Plaintiffs then contend that 31 U.S.C. § 3124 (1982) results in Social Security benefits being exempt from state taxation. Section 3124 states in relevant part: "(a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State."

Plaintiffs make two arguments in support of their position. They first contend that payment of Social Security benefits is an obligation of the U.S. government and is thus exempt from state taxation by the terms of § 3124. In the same manner they choose to construe the word "levy" as set out above, plaintiffs attribute a different meaning to the word "obligation" than is warranted by the statute.

"Obligation" may be a "duty"or "the act of obligating oneself to a course of action"; that is, in this case, the United States has recognized its duty to support its citizens in their later years or in emergencies. "Obligation" may also be "an investment security (corporate bonds and other obligations)." Webster's Third New International Dictionary, Unabridged 1556 (1981).

In § 3124, the meaning of "obligation" is that of an investment security, a financial instrument. A state may not tax the interest on such an obligation. In *State ex rel. Douglas v. Karnes*, 216 Neb. 750, 760, 346 N.W.2d 231, 236 (1984), this court held that *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 103 S. Ct. 692, 74 L.Ed.2d 562 (1983), "was the death knell for state franchise taxes discriminating against federal obligations. . . ." The Nebraska opinion discussed the adverse effects of Nebraska's attempting to levy a tax on income from federal obligations while at the same time exempting interest income from state securities. It is clear the *Karnes* case was concerned with state taxation of interest being earned on federal "obligations" in the sense obligations are investment securities. We are not concerned with such "obligations" in this case.

This conclusion is buttressed when the source of § 3124 is examined. That source was 31 U.S.C. § 742 (1976), effective in 1959, which provided, in pertinent part: "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." The explanatory note following § 3124 states that the words: "Except as otherwise provided by law, all . . . bonds, Treasury notes, and other" contained in former § 742 were "omitted as surplus." The Congress recognized that "stocks and obligations" as expressed in § 3124 means "stocks, bonds, Treasury notes, and other obligations of the United States," as stated in former § 742.

Regarding the statutory exemption provided under § 742, the U.S. Supreme Court, in *Smith v. Davis*, 323

U.S. 111, 116-17, 65 S. Ct. 157, 89 L.Ed. 107 (1944), stated:

> [Section 742] on its face applies only to written interest-bearing obligations issued pursuant to Congressional authorization. Stocks, bonds, and Treasury notes are obviously of that nature. And, under the rule of *ejusdem generis*, it is reasonable to construe the general words "other obligations," which allegedly cover open accounts, as referring only to obligations or securities of the same type as those specificially enumerated. . . . This interpretation is in accord with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit. It is unnecessary to extend such tax exemption, at least through statutory interpretation, to non-interest-bearing claims or obligations which the United States does not use or need for credit purposes.

Plaintiffs then argue that Social Security benefits are obligations of the U.S. government by virtue of the fact that the Federal Old-Age and Survivors Insurance Trust Fund invests in securities held by the Secretary of the Treasury. Plaintiffs state in their brief that the Social Security tax revenues which will ultimately be paid out to recipients are placed in this trust fund and that the portion of the trust fund not required to meet current benefit payments is invested in interest-bearing obligations of the United States under 42 U.S.C. § 401(d) (Supp. III 1985). Plaintiffs then contend that "[t]he Social Security benefits paid by the federal government represent the proceeds of United States obligations. . . ." Brief for Appellants at 10. It is not possible for this court to know if plaintiffs' statement is an

accurate reflection of how the laws of the United States operate, but we do determine that the Nebraska income tax in this case does not operate as a tax on the interest generated by any U.S. financial security or obligation, but operates on moneys received, in the nature of retirement annuities, by a Nebraska resident. Section 3124 does not prohibit the tax in question.

The arguments of plaintiffs are not persuasive. The order of the district court granting defendants' motion for summary judgment was correct and is affirmed.

AFFIRMED.

APPENDIX B

Judgment of the District Court of Nuckolls County, Nebraska

The Judgment of the District Court of Nuckolls County, Nebraska, was entered on February 19, 1986, as follows:

IN THE DISTRICT COURT OF
NUCKOLLS COUNTY NEBRASKA

LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs, vs. DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, Defendants.	)	Docket 22 Page 41 Case No. 5878 *JUDGMENT*

The Plaintiffs' Motion for Summary Judgment is denied. Defendants' Motion for Summary Judgment is granted because there are no material facts at issue which might entitle Plaintiffs to the tax refund claimed in their Petition.

Dated: February 19, 1986.

BY THE COURT:

Orville L. Coady, District Judge

APPENDIX C

NOTICE OF APPEAL

The Notice of Appeal was filed in the Supreme Court of the State of Nebraska on the 28th day of January, 1988, as follows:

IN THE SUPREME COURT OF
THE STATE OF NEBRASKA

LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs-Appellants, vs. DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, Defendants-Appellees.	Case No. 86-196 *NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES*

Notice is hereby given that Lloyd Boersma and Phyllis Boersma, the Plaintiffs-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska, entered in this proceeding on January 8, 1988.

A copy of this Notice of Appeal has been filed with the District Court of Nuckolls County, Nebraska, at Case No. 5878, Docket 22, Page 41.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated this 28th day of January, 1988.

KATHERINE A. BOERSMA, Personal Representative of the Estate of LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs-Appellants

BY LUEBS, DOWDING, BELTZER, LEININGER, SMITH & BUSICK
Wheeler at First Street
P.O. Box 790
Grand Island, Nebraska 68802
Telephone: (308) 382-1930

By /s/ Michael L. Johnson
Michael L. Johnson, #015090

STATE OF NEBRASKA)
) ss:
COUNTY OF HALL)

I, Michael L. Johnson, depose and say that I am an attorney in the office of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, Wheeler at First Street, P.O. Box 790, Grand Island, Nebraska 68802, attorney of record for Lloyd Boersma and Phyllis Boersma, Plaintiffs-Appellants herein, and that on January 28, 1988, pursuant to Rule 33, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal on each of the parties required to be served herein as follows:

On DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, the Defendants-Appellees herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert M. Spire,

Attorney General, and L. Jay Bartel, Assistant Attorney General, counsel of record for said Defendants-Appellees, at their office at 2115 State Capitol, Lincoln Nebraska 68509-4906.

All parties required to be served have been served.

By /s/ Michael L. Johnson
Michael L. Johnson, #015090

Subscribed and sworn to before me this 28th day of January, 1988.

/s/ Marietta Smidt
Notary Public

(SEAL)
Commission expires January 29, 1992.

A copy of the Notice of Appeal was filed in the District Court of Nuckolls County Nebraska, on the 28th day of January, 1988, as follows:

IN THE DISTRICT COURT OF
NUCKOLLS COUNTY, NEBRASKA

LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs, vs. DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, Defendants.	Docket 22 Page 41 Case No. 5878 *NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES*

Notice is hereby given that Lloyd Boersma and Phyllis Boersma, the Plaintiffs-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska, entered in this proceeding on January 8, 1988.

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By /s/ Michael L. Johnson
Michael L. Johnson, #015090

STATE OF NEBRASKA)
) ss:
COUNTY OF HALL)

I, Michael L. Johnson, depose and say that I am an attorney in the office of Luebs, Dowding, Beltzer,

Leininger, Smith & Busick, Wheeler at First Street, P.O. Box 790, Grand Island, Nebraska 68802, attorney of record for Lloyd Boersma and Phyllis Boersma, Plaintiffs-Appellants herein, and that on January 28, 1988, pursuant to Rule 33, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal on each of the parties required to be served herein as follow:

> On DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, the Defendants-Appellees herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert M. Spire, Attorney General, and L. Jay Bartel, Assistant Attorney General, counsel of record for said Defendants-Appellees, at their office at 2115 State Capitol, Lincoln Nebraska 68509-4906.
>
> All parties required to be served have been served.
>
> By /s/ Michael L. Johnson
> Michael L. Johnson, #015090

Subscribed and sworn to before me this 28th day of January, 1988.

/s/ Marietta Smidt
Notary Public

(SEAL)
Commission expires January 29, 1992.

APPENDIX D

Statutory Provisions Involved

NEB. REV. STAT. § 77-2715 (Supp. 1983):

"77-2715. *Income tax; rates; terms, defined; credits.* (1) A tax is hereby imposed for each taxable year on the entire income of every resident individual of this state and on the income of every nonresident individual of this state which is derived from sources within this state. The tax shall be a flat percentage of, for each resident individual, the taxpayer's adjusted federal income tax liability for the taxable year, and for each nonresident individual, the taxpayer's adjusted federal income tax liability for the taxable year which is attributable to income derived from sources within this state.

The taxpayer's adjusted federal income tax liability shall be the amount of federal income tax, as determined under Subtitle A, Chapter I, subchapter A, Pars I, V, and VI of the Internal Revenue Code, for which the taxpayer would have been liable if such taxpayer had paid federal income tax based on federal taxable income as adjusted by the modifications provided in section 77-2716 without any allowance for credits against such tax permitted under the Internal Revenue Code.

The adjusted federal income tax liability of each nonresident individual taxpayer which is attributable to income derived from sources within this state shall be determined by multiplying his or her adjusted federal income tax liability by a fraction, the numerator of which is his or her taxable income derived from sources within this state as determined by section 77-2733, and the denominator of which is his or her total federal taxable income, after first subtracting from each the amounts provided in subsection (1) of section 77-2716; *Provided*, that if the above determination attributes more or less federal income tax than is reasonably attributable to income derived from sources within this state, the taxpayer may petition for, or the Tax Commissioner may require, the employment of any other method to attribute an amount of

federal income tax which is reasonable and equitable in the circumstances.

(2)(a) A resident of this state shall mean an individual who is domiciled in Nebraska or who maintains a permanent place of abode in this state and spends in the aggregate more than six months of the taxable year in this state; and

(b) A nonresident shall mean an individual who is not a resident of this state.

(3) There shall be allowed, to qualified resident individuals as a credit against the tax imposed by sections 77-2714 to 77-27,135, a credit for the elderly equal to fifty per cent of the federal credit allowed under section 37 of the Internal Revenue Code.

(4) Subject to termination under section 66-1055, there shall be allowed to individuals as a credit against the tax imposed by sections 77-2714 to 77-27,135, a credit for renewable energy source systems as provided under section 66-1047."

42 U.S.C.S. § 407:

"§ 407. *Assignment.*

(a) The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law, enacted before, on, or after the date of the enactment of this section [enacted Aug. 14, 1935], may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."

United States Constitution, Art. VI, cl. 2:

"Clause 2, Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."